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Supreme Court, U.S.
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No. 96-397

In the Supreme Court of the United States

OCTOBER TERM, 1996

MUSHTAQ SAMUEL

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner was ineligible for a waiver of inadmissibility under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), because he was deportable for having been convicted of unlawfully possessing a firearm, a ground of deportation that has no counterpart in exclusion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the decision is noted at 81 F.3d 173 (Table). The order of the Board of Immigration Appeals (Pet. App. 10a-12a) and the decision of the immigration judge (Pet. App. 8a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1996. A petition for rehearing was denied on May 28, 1996. Pet. App. 13a-14a. The petition for a writ of certiorari was filed on August 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Pakistan, entered the United States as an immigrant in 1981. On March 31, 1992, he was convicted of possessing an unregistered firearm. Upon his release from incarceration, he was charged by the Immigration and Naturalization Service (INS) with deportability on account of his firearms conviction. Petitioner conceded that he was deportable under Section 241(a)(2)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(C), but sought a waiver of inadmissibility under Section 212(c) of the INA, 8 U.S.C. 1182(c). Pet. App. 2a, 8a-9a.

On November 2, 1994, an immigration judge found that petitioner was deportable as charged and that he was statutorily ineligible for a Section 212(c) waiver. Pet. App. 8a-9a. The Board of Immigration Appeals (BIA) affirmed. Pet. App. 10a-12a. Consistent with its prior decisions and with uniform judicial precedent, the BIA held that it had no power to grant petitioner a waiver of inadmissibility under Section 212(c), because petitioner was deportable on the basis of his conviction for a firearms offense and there was "no exclusion ground corresponding to the deportation ground for conviction of a firearms offense." Pet. App. 12a.

2. The court of appeals denied the petition for review. The court observed that, while Section 212(c) pertains only to the admissibility of permanent resident aliens returning to the United States, the Attorney General's authority to grant discretionary relief from exclusion has been extended because of equal protection concerns to cases in which an alien is subject to deportation on grounds for which he

could have been excluded had he left the country and sought to return. Pet. App. 2a (citing *Francis* v. *INS*, 532 F.2d 268, 272-273 (2d Cir. 1976)).* It noted, however, that the Attorney General will consider an application for a waiver of deportation only when the ground of deportation to be waived has "an analogous ground of exclusion that could be waived under [Section 212(c)]." Pet. App. 2a-3a. Agreeing with the Attorney General and with the other courts of appeals that have ruled on the matter, the court held that a "[Section 212(c)] waiver is unavailable when the ground of deportation is a firearms conviction because there is no sufficiently analogous ground of exclusion." Pet. App. 3a; see also *ibid.* ("[A]ll of the precedent leads only to one rule of law, from which we are not inclined to depart.").

ARGUMENT

Petitioner argues (Pet. 7-11) that he is statutorily eligible for a waiver of inadmissibility under Section 212(c), notwithstanding the fact that there is no ground of exclusion analogous to the ground on which he is deportable—conviction of unlawful possession of a firearm. The court of appeals correctly rejected that argument, and its decision is consistent with the

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* In *Francis*, the Second Circuit held that the equal protection guarantee implicit in the Fifth Amendment requires the Attorney General to apply Section 212(c) to aliens who are subject to deportation based on a ground of deportability that is also a ground of exclusion. 532 F.2d at 272-273. The court reasoned that, if an alien would have been eligible for a waiver of inadmissibility had he departed the country and sought to return, he should equally be eligible for a waiver of deportation if he never left. *Ibid.* The Board adopted that position in *In re Silva*, 16 I. & N. Dec. 26 (BIA 1976).

holding of every court of appeals that has considered the matter.

1. Section 212(c) provides that certain classes of permanent resident aliens who have departed the country and are excludable under the Act upon reentry may nonetheless be admitted in the discretion of the Attorney General. See 8 U.S.C. 1182(c). Although Section 212(c) does not, on its face, address deportees, the right to be considered for discretionary relief has, because of equal protection concerns, been extended to deportees whose grounds for deportation are analogous to grounds for exclusion that are subject to Section 212(c) waiver. See *Francis*, 532 F.2d at 272; *In re Silva*, 16 I. & N. Dec. at 30. The Attorney General has recognized, however, that the nontextual application of Section 212(c) may be extended no further than necessary to placate constitutional concerns, and the Section can therefore have no application to a deportee whose ground for deportation is one for which there is no substantially equivalent ground for exclusion, such as conviction of a firearms offense. See *Hernandez-Casillas* v. *INS*, Interim Dec. No. 3147 (Att'y Gen. Mar. 18, 1991), aff'd mem., 983 F.2d 231 (5th Cir. 1993).

There is no conflict among the circuits on this issue. Every court of appeals that has decided the question agrees with the Attorney General that Section 212(c) does not authorize her to grant a waiver of deportation to an alien who has been found deportable for having been convicted of a firearms offense, because conviction of a firearms offense is a ground of deportation for which there is no analogous ground of exclusion. See *Campos* v. *INS*, 961 F.2d 309, 314-317 (1st Cir. 1992); *Cato* v. *INS*, 84 F.3d 597, 599-602 (2d Cir. 1996); *Rodriguez* v. *INS*, 9 F.3d 408, 410-414 (5th

Cir. 1993); *Gjonaj* v. *INS*, 47 F.3d 824, 827 (6th Cir. 1995); *Dashto* v. *INS*, 59 F.3d 697, 700 n.2 (7th Cir. 1995); *Cabasug* v. *INS*, 847 F.2d 1321, 1322-1327 (9th Cir. 1988); *Rodriguez-Padron* v. *INS*, 13 F.3d 1455, 1458-1461 (11th Cir. 1994).

The courts of appeals have correctly rejected the argument, asserted here by petitioner (Pet. 9-11), that it was irrational (and therefore unconstitutional) for Congress to afford no avenue for discretionary relief to an alien who is deportable by reason of having been convicted of a firearms offense, while authorizing the Attorney General to waive the deportation of aliens whose grounds for deportation consist of "more serious offenses." The Constitution does not require "Congress to lay out crimes on a spectrum, and grant at least as much discretion for the less serious as for any more serious crimes." *Cabasug*, 847 F.2d at 1327; accord *Cato*, 84 F.3d at 602; *Rodriguez-Padron*, 13 F.3d at 1459. Congress had "a 'facially legitimate and bona fide reason' to treat weapons offenders and other offenders differently," *Cato*, 84 F.3d at 602 (quoting *Fiallo* v. *Bell*, 430 U.S. 787, 794 (1977)); see also *Rodriguez-Padron*, 13 F.3d at 1459; *Rodriguez*, 9 F.3d at 413-414; *Campos*, 961 F.2d at 315-317; *Cabasug*, 847 F.2d at 1327, and that is all that the Constitution requires.

Contrary to petitioner's argument (Pet. 7), the decision below does not conflict with the Second Circuit's decision in *Bedoya-Valencia* v. *INS*, 6 F.3d 891 (1993). In that case, the court held that Section 212(c) relief was available to an alien who had been found deportable under Section 241(a)(1)(B) of the INA, 8 U.S.C. 1251(a)(1)(B), for entering without inspection, a ground for deportation that is not cause for exclusion. The court reasoned that, in that context, the

absence of an analogous ground for exclusion said nothing about Congress's intent, because "entry without inspection [is] a ground for deportation which, as a matter of logic, cannot be a ground for exclusion." 6 F.3d at 897 (quoting *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 950-952 (7th Cir. 1993)). The rule announced in *Bedoya-Valencia* has no application where an alien is deportable for a reason (such as conviction of a firearms offense) that could rationally be a ground for exclusion. See *Cato*, 84 F.3d at 599-600 (joining the other courts of appeals holding that Section 212(c) is unavailable to a deportee whose ground for deportation is conviction of a firearms violation).

2. On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009. Section 304 of the IIRIRA repeals Section 212(c) in its entirety and replaces it with a new form of discretionary relief (termed "cancellation of removal") that applies equally to inadmissible and deportable aliens. See IIRIRA § 304(a) and (b). Cancellation of removal is available to any permanent resident alien who is inadmissible or deportable (including those who are deportable by reason of having been convicted of a firearms offense) "if the alien—(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony." IIRIRA § 304(a). The new rules respecting cancellation of removal apply only to deportation proceedings initiated after April 1, 1997. IIRIRA § 309(a) and (c).

Although the IIRIRA has no application in this case, Congress's elimination of Section 212(c) in favor of a new provision that expressly provides for discretionary relief from deportation substantially diminishes the ongoing legal importance of the issue raised by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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